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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DERICK PAYNE,

Plaintiff and Appellant,

v.

JAMES W. YOUNG,

Defendant and Respondent.

B214001

(Los Angeles County
Super. Ct. No. VC049589)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Thomas I. McKnew, Jr., Judge. Affirmed.

Derick Payne, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Derick Payne appeals from a judgment returning possession to him of his vehicle that the trial court found the defendant had converted. Payne contends court error prevented him from prevailing on his other conversion claims as well. We affirm.

BACKGROUND

In the early 2000s, Payne operated several real estate related businesses. James W. Young's now deceased wife was employed in one of Payne's businesses. In August 2004, Payne borrowed approximately \$100,000 from Young after, according to Payne, Payne's estranged wife withdrew trust funds from escrow accounts and misappropriated the proceeds. The loans were evidenced by promissory notes and secured by real property, including the Paynes' family residence.

In 2005, Payne was convicted of assaulting his wife and sent to prison. While in prison, Payne relied on Young, Young's wife, Payne's close friend Adlean Fuller, and his former employees to safeguard his personal and business property. After the landlord evicted Payne's businesses for nonpayment of rent, Young moved the office furniture and equipment into storage facilities.

After his release from prison in May 2007, Payne called Young and inquired about his property. Apparently Young told Payne that others had assumed responsibility for his business equipment and furniture. Young, however, did not disclose that he still had possession of Payne's Mercedes and that he had been storing it at his trucking business.

On June 14, 2007, Young conducted a lien sale at which he purchased the Mercedes for \$60,000, the amount Young claimed was owed in accrued storage fees calculated at \$2,000 per day. On September 27, 2007, the family court, pursuant to a dissolution action, awarded the Mercedes to Payne.

On October 9, 2007, Payne sued Young for, inter alia, conversion of the Mercedes and conversion of his former businesses' furniture and equipment. Young filed a cross-complaint on behalf of himself and J.W. Young Trucking, Inc., against Payne (and others for indemnity on Payne's conversion claims), alleging that Payne, in addition to the secured loans, had an outstanding unsecured loan of approximately \$100,000.

At a court trial Payne represented himself in *propria persona*. On November 12, 2008, the court issued a statement of decision. With respect to the business property, the court found that “Young’s deceased spouse, Julia Young, and others, who worked for Payne helped move the office equipment on or about May 4, 2006. It was established that Young, with a truck he rented and helpers he hired, did move some office equipment to three storage units in Norwalk, California. It was Young’s intent to store that office equipment for the benefit of Payne, while Payne was in state prison.

“Young initially paid the rental for the storage units he rented on behalf of Payne, but later turned over that obligation to Ms. Fuller-Harris, a friend of Payne’s. Pursuant to and in compliance with a court order, Ms. Fuller-Harris eventually transferred the stored property to Payne’s former wife’s attorney. Young did all of the above out of friendship with Payne and to maintain this relationship because Payne owed Young money.”

The court found that Payne had presented no substantial evidence to establish that Young converted any of Payne’s office furniture or equipment. The court noted that “[o]thers had access to the office equipment and it was never proven what equipment, if any, may have been taken by anyone.” Accordingly, the court granted Young’s request for nonsuit on Payne’s claim for damages for conversion of the businesses’ equipment and furniture. The court likewise found that Young had failed to prove his claims regarding the unsecured loans and granted Payne nonsuit on Young’s breach of oral contract claims.

With respect to the Mercedes, the court found that Young had converted the vehicle and, although it had been registered to Payne’s now defunct business, that Payne had the right to immediate possession of the Mercedes. Because at the conclusion of the trial Payne apparently indicated that he preferred return of the vehicle rather than damages for its then market value, the court issued a mandatory injunction ordering that the vehicle be immediately returned to Payne.

Payne filed a motion for new trial which the trial court denied. This appeal followed.

DISCUSSION

Judicial Errors at Trial

Payne contends he is entitled to a new trial because the trial court (1) did not permit him to adequately cross-examine witnesses; (2) did not permit all subpoenaed witnesses to testify; (3) did not admit into evidence all subpoenaed documents; (4) awarded inadequate damages for the conversion of his personal property; (5) erred in permitting Adlean Fuller to testify; and (6) impermissibly prejudged the merits of the parties' cases, ridiculed the parties and Young's attorney before the witnesses, and thus committed judicial misconduct.

In the absence of a showing to the contrary, this court presumes in favor of the judgment and presumes substantial evidence supports the trial court's findings and damage award. "All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563; see also *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [on appeal all presumptions are indulged in favor of the correctness of a judgment].)

The burden was on Payne to overcome the presumption of correctness and to show reversible error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [“The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error.”].) Because Payne has not supplied us with a trial transcript, the record is inadequate to evaluate his contentions and consequently Payne cannot show error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) We accordingly have no basis to disturb the judgment.

Denial of Jury Trial

Payne contends the trial court violated his constitutional rights by denying his request for a jury trial. We disagree.

At the April 24, 2008, status conference Young requested a jury trial. The court set the final status conference for September 25, 2008. At the September 25, 2008, final status conference Young changed his mind and waived jury. Payne states that he requested a jury trial at the September 25, 2008, final status conference, but nothing in the record before us supports this claim. Payne apparently did not post jury fees or file an application for a fee waiver on September 25, 2008, the last day to timely post jury fees before the scheduled October 20, 2008, trial date. On October 20, 2008, the first day of trial, Payne filed an application for a waiver of additional court fees and costs, including jury fees.¹

The court conducted a bench trial and thereafter noted in a post-judgment order that the parties had “duly waived” jury.

Code of Civil Procedure section 631, subdivision (d) specifies ways in which a party waives trial by jury.² There is no evidence Payne actually requested a jury trial at the final status conference because he did not designate for inclusion in the appellate record either the reporter’s transcript or minute orders from the final status conference hearing. If Payne did not request a jury trial at this hearing setting the trial date he waived jury by failing to announce that he wanted a jury trial after Young changed his mind and waived jury. (Code Civ. Proc., § 631, subd. (d)(4).) Assuming Payne did request a jury trial at the September 25, 2008, final status conference, he waived trial by

¹ Payne had apparently already received a waiver of court costs and fees for other matters.

² Code of Civil Procedure section 631, subdivision (d) provides: “A party waives trial by jury in any of the following ways:

“(1) By failing to appear at the trial.

“(2) By written consent filed with the clerk or judge.

“(3) By oral consent, in open court, entered in the minutes.

“(4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.

“(5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b) [at least 25 days before the date initially set for trial].

“(6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day’s session, the sum provided in subdivision (c).”

jury by failing to post jury fees or to secure a fee waiver on that date, the last date to do so before the scheduled trial date. (Code Civ. Proc., § 631, subds. (b) & (d)(5) [“The deposit shall be made at least 25 calendar days before the date initially set for trial”].) There is no evidence to show that Payne posted jury fees. Instead, the evidence shows that Payne did not apply for a jury fee waiver until October 20, 2008, the first day of trial. By filing an untimely application for a fee waiver Payne waived jury trial. (Code Civ. Proc., § 631, subd. (d)(5).)

Although Payne waived trial by jury the “court may, in its discretion upon just terms, [nevertheless] allow a trial by jury” (Code Civ. Proc., § 631, subd. (e).) “In exercising its discretion, a court is entitled to consider many factors, including the possibility of delay in rescheduling the trial for a jury, lack of funds, timeliness of request and prejudice to all the litigants.” (*March v. Pettis* (1977) 66 Cal.App.3d 473, 480.)

There is nothing in the appellate record to show that Payne requested relief from his waiver of a jury trial. (*Taylor v. Union Pac. R.R. Corp.* (1976) 16 Cal.3d 893, 900 [“Legal points of this nature [request for relief from waiver of jury trial] must be presented on appeal by a record supporting trial assertion of the claim”].) But assuming he did, Payne has nevertheless failed to carry his burden to show that the trial court abused its discretion in denying him relief from waiver. As noted, Payne did not provide this court with a reporter’s transcript, or other evidence, showing the reasons the court gave for proceeding as a bench trial. In the absence of a record demonstrating an abuse of discretion, we presume the court articulated sound reasons for its decision. (See *Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal.4th at p. 132.)

DISPOSITION

The judgment is affirmed. Appellant to bear his own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.